Supreme Court, U.S.
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NO. _____

IN THE UNITED STATES SUPREME COURT

October Term 1993

GREGORY JOHNSON
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

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82 pp

QUESTION PRESENTED FOR REVIEW

What is the standard of proof for determining whether a Defendant's conduct is obstruction under the United States Sentencing guidelines §3C1.1.

LIST OF PARTIES TO PROCEEDING BELOW

UNITES STATES OF AMERICA

GREGORY JOHNSON

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U.S.S.G § 3C1.1.

REPORT OF THE OPINIONS OF THE ELEVENTH CIRCUIT

The Eleventh Circuit denied Petitioner's Appeal without issuing an opinion.

SUPREME COURT JURISDICTION

The sentencing of Petitioner and Entry of Judgement occurred on January 7, 1993. His conviction and sentence were affirmed by the United States Court of Appeals for the Eleventh Circuit on December 3, 1993. Petitioner's request for rehearing was denied on January 19, 1994.

This Court's jurisdiction to review the Court of Appeals decision is conferred by 28 U.S.C §1254(1).

STATUTES INVOLVED IN THE CASE

United States Sentencing Guidelines § 3C1.1 (set out in part in Appendix "A").

STATEMENT OF PROCEEDING AND DISPOSITION

This Petition seeks the Court's review of the sentence imposed following a verdict of guilty in a federal criminal trial, upon which the District Court's jurisdiction was predicated.

On January 23, 1992, the Grand Jury of the Northern District of the U.S. District Court returned a nine-court indictment against Gregory Johnson. The indictment was for Four Counts of Tax Evasion, 26 U.S.C §7201, (Counts One, Two, Four, and Five of the indictment); One Count of False Tax Return, 26 U.S.C §7206, (Count Three of the indictment); Three Counts of Payola, 47 U.S.C §508 (Counts Six, Seven and Eight), and One Count of Currency Transaction Fraud, 31 U.S.C §5324 (Count Nine).

Defendant was arraigned on January 23, 1992. Defendant entered a plea of not guilty. The case was certified ready for trial on February 25, 1992. The jury trial began on July 6, 1992. At the close of the Government's case, the Court granted Defendant's Motion for Verdict of Acquittal on Count Nine (R1-25). On July 13, 1992, the jury convicted Appellant on Counts Two, Four and Five (Tax Evasion). The jury found defendant not guilty on Count One (Tax Evasion), Count Three (False Tax Return), and Counts Six, Seven and Eight (Payola).

On January 5, 1993, Defendant was sentenced to a term of thirteen months imprisonment for each count, to run concurrently. Notice of Appeal was filed on January 13, 1993.

On December 13, 1993 the Eleventh Circuit denied, without opinion, Petitioner's appeal. Petitioner filed for reconsideration. The Motion for Reconsideration was denied on January 19, 1994.

STATEMENT OF FACTS

Gregory Johnson was the sole Defendant named in the nine-count indictment. The indictment alleged Four Counts of Tax Evasion, One Count of False Tax Return, Three Counts of Payola Violation, and One Count of Currency Transaction Fraud.

Count One charged Defendant with Tax Evasion for the tax year 1983. Defendant was found not guilty on that count.

Count Two charged Defendant with Tax Evasion for the tax year 1984. Defendant was found guilty on that count.

Count Three charged Defendant with Filing a False Tax Return for 1985. Defendant was found not guilty on that count.

Count Four charged Defendant with Tax Evasion for the tax year 1987. Defendant was found guilty on the count.

Count Five charged Defendant with Tax Evasion for the tax year 1988. Defendant was found guilty on the count.

Counts Six, Seven and Eight charged Defendant with Payment of Payola on three separate occasions. Defendant was found guilty on all three counts.

Count Nine charged Defendant with Violation of the Currency Transaction Fraud Statute. The Court directed a verdict of acquittal on that count.

After conviction of three of the original nine counts, the court ordered a pre-sentence report. The pre-sentence report suggested an upward enhancement of Defendant's sentence based on a finding of obstruction. The obstruction was based on alleged false statements Defendant made to IRS officers prior to indictment.

In 1989, Mr. Johnson was visited by IRS agents. The agents questioned him as to his 1984 tax return. Mr. Johnson said, as far as he knew, all income was reported on his tax return (R9-989). At that same meeting, Mr. Johnson allegedly told the IRS agent that a certified public accountant was working on his tax returns for 1987 and 1988 and that an Extension to File was filed by this certified public accountant (R9-987). Defendant is also alleged to have obstructed the agents by failing to provide a phone number and address of the individual who prepared Defendant's 1983 and 1984 tax returns (R9-988).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. There is a split in the Circuit Courts of Appeal as to the standard of proof to be applied pursuant to U.S.S.G. § 3C1.1.

U.S.S.G. § 3C1.1 provides: Obstructing or Impeding the Administration of Justice.

If the Defendant willfully obstructed or impeded, or orattempted to obstruct or impede, the administration of justice during the investigation, prosecution or sentencing of the instant offense, increase the offense level by two levels.

Application Note 1 provides the standard to be applied in determining whether the Defendant's conduct is U.S.S.G. §3C1.1 Obstruction. Application Note 1 provides that:

> In applying this provision in respect to alleged false testimony or statements by the Defendant, such testimony or statements should be evaluated in a light most favorable to the Defendant.

In U.S. v. Cunavelis, 969 F.2d 1419 (2nd Cir. 1992), the Second Circuit addressed the issue of the burden of proof required to find U.S.S.G. § 3C1.1 obstruction. The Second Circuit held:

> "We have interpreted this Application Note [Application Note 1, to U.S.S.G. § 3C1.1] as instructing the sentencing judge to resolve in favor of the Defendant these conflicts about which the judge, after weighing the evidence, has no firm conviction . . . " This standard is obviously different—and more favorable to the Defendant—than the preponderance-of-evidence standard a district court applied in determining whether to grant a suppression motion."

Cunavelis, supra at 1423.

In U.S. v. Wallace, 904 F.2d 603 (11th Cir. 1990), the Eleventh Circuit held that:

> In determining whether a defendant's testimony was false and that an enhancement under U.S.S.G. § 3C1.1 is appropriate, the Sentencing Commission has cautioned that

"suspect testimony and statements should be evaluated in a light most favorable to the defendant." U.S.S.G. § 3C1.1, Application Note 2. This cautionary note does not mandate the resolution of every conflict in testimony in favor of the defendant; rather, it "simply instructs the sentencing judge to resolve in favor of the defendant those conflicts about which the judge, after weighing the evidence, has no firm conviction."

Wallace, Supra at 604.

In U.S. v. Franco-Torres, 869 F.2d 797 (5th Cir. 1989), the Fifth Circuit held that (In regard to note 1, to §3 C1.1.):

That note says, "In applying this provision, suspect testimony and statements should be evaluated in a light most favorable to the defendant. We do not believe that this note requires the sentencing judge to believe the defendant whenever he denies that he hid evidence, or shot at witnesses. To construe

the note in that way would effectively enable every defendant to nullify its application by self-serving testimony. Instead, we believe the note simply instructs the sentencing judge to resolve in favor of the defendant those conflicts about which the judge, after weighing the evidence, has no firm conviction."

Franco-Torres, supra, at 800, 801.

The Eleventh and Fifth Circuits apply a Preponderance of Evidence Standard. The Second Circuit quite plainly states that the standard is more strict than the Preponderance of Evidence Standard.

In the instant case, the Eleventh Circuit Court decision applied the Preponderance of Evidence Standard. This resulted in affirming the District Court's decision. Under the more strict standard, set forth by the Second Circuit, the Court could not uphold the District Court's decision. A review of the factual basis for the finding of the obstruction supports petitioners position.

In the instant case, the pre-sentence report recommended a U.S.S.G. § 3C1.1 upward adjustment for obstruction (PSI Report page 13). This recommendation was based on pre-indictment contact between Defendant Gregory Johnson and IRS agents. The contact occurred in 1989 and involved statements Defendant made to the agents.

The agents asked Defendant if his 1984 tax return were accurate. Defendant stated that as far as he knew the 1984 return was accurate and complete (R9-989). The second statement concerned Defendant's 1987 and 1988 tax returns. According to the agents, Defendant told the agents that a certified public accountant was handling the returns and had filed an Extension for Filing (R9-987). Finally, the IRS agents alleged Defendant refused to give the address and phone number of a person named Butch Bryant. Mr. Bryant was the preparer of Defendant's 1983, 1984, and 1985 tax returns. The agents testified that Defendant said he would have Mr. Bryant call them (R9-988).

This conduct is not obstruction. The statement regarding the 1984 tax return was no more than a simple denial of guilt,

a statement protected by the Constitution and permitted under U.S.S.G. § 3C1.1. Assuming, arguendo, the statement was not a simple denial of guilt, the record reflects that the Government made no showing that the statement obstructed the investigation in any way.

The second statement regarding the 1987 and 1988 tax returns does not rise to the level of obstruction. The testimony of the IRS agent reveals clearly that the agent knew Defendant had not filed his tax returns for 1987 and 1988, nor had he filed an extension (R9-986 and R9-987). There was no showing that the Government relied upon this statement nor that this statement in any way hindered the investigation.

Finally, the alleged refusal of Defendant to provide the name and address of Butch Bryant is not obstruction. The IRS agent did testify that it was several months before she found Butch Bryant (R9-986). However, the agent admitted that in her discussion with Defendant, he stated he would tell Mr. Bryant to contact her (R9-988). The agent admitted that in all of her discussions with Mr. Bryant that she never asked Mr. Bryant if Defendant had asked him to contact her (R9-1002). As the facts

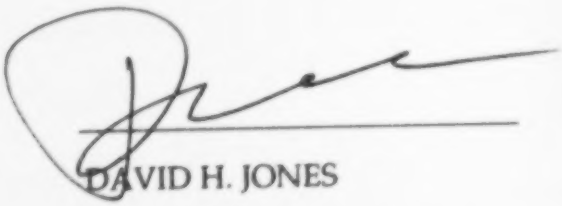
must be constructed most favorably to Defendant, the failure of Mr. Bryant to contact the IRS may not have been Defendant's responsibility. In any case, as with the other statements, the Government cannot show that this hindered the investigation in a significant manner.

CONCLUSION

This case presents a significant issue of sufficient importance which requires, in resolution, a uniformity only this Court can provide.

WHEREFORE, Petitioner Gregory Johnson respectfully prays that his Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals be granted.

Respectfully submitted,



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APPENDIX "A"

1) U.S.S.G § 3 C1.1.

SENTENCING GUIDELINES

PART C - OBSTRUCTION

§ 3C1.1. Obstructing or Impeding the Administratoin of Justice

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

Commentary

Application Notes:

1. *This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, such testimony or statements should be evaluated in a light most favorable to the defendant.*

2. *Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 3 sets forth examples of the types of conduct to which this enhancement is intended to apply. Application Note 4 sets forth examples of less serious forms of conduct to which this inhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determinatino of the particular sentence*

within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes 3 and 4 should assist the court in determining whether application of this enhancement is warranted in a particular case.

3. *The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:*

   (a) *threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;*

   (b) *committing, suborning, or attempting to suborn perjury;*

   (c) *producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;*

   (d) *destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigaion or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;*

   (e) *escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding.*

CERTIFICATE OF SERVICE

This is to certify that I have caused a copy of Gregory Johnson's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, to be served upon opposing counsel of record as indicated below, and pursuant to Supreme Court Rule 29.4(a) Upon the Solicitor General of the United States, by placing a true and correct copies on the same in the United States mail, first class postage prepaid, in separate envelope addressed properly as follows:

Martin Weinstein, Assistant U.S. Attorney
Suite 1800
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Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

This the 15th Day of April 1994.

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NO. 93-1712

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October Term 1993

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UNITED STATES OF AMERICA
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SUPPLEMENTAL APPENDIX
TO PETITION FOR WRIT OF CERTIORARI TO
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THE ELEVENTH CIRCUIT

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CERTIFICATE OF SERVICE

This is to certify that I have caused a copy of Gregory Johnson's Supplemental Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, to be served upon opposing counsel of record as indicated below, and pursuant to Supreme Court Rule 29.4(a) Upon the Solicitor General of the United States, by placing a true and correct copies on the same in the United States mail, first class postage prepaid, in separate envelope addressed properly as follows:

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Solicitor General of the United States
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This the 23 Day of April 1994.

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